

ALAMO NAVAJO SCHOOL	:	Order Docketing And Dismissing
BOARD, INC.	:	Appeal
	:	
v.	:	
	:	Docket No. IBIA 81-11-A
DEPUTY ASSISTANT SECRETARY,	:	
INDIAN AFFAIRS	:	January 13, 1981

On January 6, 1981, the Board of Indian Appeals received a notice of an appeal, transmitted through the Office of the Secretary, filed by the Alamo Navajo School Board, Inc., through counsel, from an administrative action taken November 13, 1980, by Thomas W. Fredericks, Deputy Assistant Secretary - Indian Affairs. Specifically, the Alamo Navajo School Board seeks to challenge the priority rankings published by the Deputy Assistant Secretary - Indian Affairs in the Federal Register on November 13, 1980, for the proposed construction of B.I.A. schools and schools operated under contract with the Bureau. See 45 Fed. Reg. 74997 (1980). The foregoing notice of appeal is hereby docketed under the above case name and docket number. However, for reasons set forth below the appeal must be dismissed by the Board for lack of jurisdiction.

The Board of Indian Appeals is an authorized representative of the Secretary for the resolution of appeals from administrative actions taken by officials of the Bureau of Indian Affairs, including decisions of the Commissioner of Indian Affairs, which are based on an interpretation of law. The Board is also authorized to decide any other matter pertaining to Indian affairs specially referred to it for exercise of the Secretary's review authority. Under present regulations, the Board is precluded from reviewing determinations of the Bureau or the Commissioner which are based on exercise of discretionary authority. 43 CFR 4.1, 4.351, 4.361(b); 25 CFR 2.19. 1/

In addition to the foregoing, the Board is not vested with general authority to review decisions of the Assistant Secretary - Indian Affairs. 2/

1/ New procedural regulations governing the Board of Indian Appeals are expected to be published in January 1981. As proposed in the Federal Register on September 16, 1980, the Board will have authority to review discretionary decisions of the Commissioner of Indian Affairs or the Assistant Secretary - Indian Affairs upon special delegation or request by such officers on a case-by-case basis. See 43 Fed. Reg. 61322, 61325.

2/ The Assistant Secretary - Indian Affairs has allowed at least one exception to this rule. See 44 Fed. Reg. 45092, 45096 pertaining to Indian child custody proceedings.

Against the above backdrop, the appeal of the Alamo Navajo School Board from the construction priorities published by the Deputy Assistant Secretary - Indian Affairs on November 13, 1980, is not reviewable by the Board of Indian Appeals on two accounts. First, the subject matter of the dispute appears to the Board to rest on whether there was a proper exercise of discretionary authority. Under present regulations, the Board is precluded from reviewing discretionary decisionmaking in the realm of Indian affairs unless such a matter has been specially referred to it by the Secretary for resolution. (Under the Board's proposed regulations cited in footnote 1, discretionary determinations of the Commissioner or Assistant Secretary - Indian Affairs may be appealed to the Board but only when so provided by the Commissioner or Assistant Secretary.) Second, the notice of appeal is from an action taken by a representative of the Secretary over whom the Board has no general review authority.

For the above reasons, the appeal of the Alamo Navajo School Board, Inc., from the November 13, 1980, action of the Deputy Assistant Secretary - Indian Affairs, set forth in 43 Fed. Reg. 74997 (1980), is dismissed for lack of jurisdiction.

Wm. Philip Horton
Chief Administrative Judge

Franklin Arness
Administrative Judge